

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT M. WAGGY,  
  
Plaintiff,  
  
v.  
  
PAUL NICHOLI,  
  
Defendant.

No. CV-07-181-FVS

ORDER GRANTING MOTION FOR  
SUBSTITUTION AND DISMISSAL

**THIS MATTER** comes before the court on the United States' Motion For Substitution and Dismissal, Ct. Rec. 2. The Plaintiff is proceeding pro se. The Defendant is represented by Frank A. Wilson.

**BACKGROUND**

The Plaintiff, Robert M. Waggy, brings claims for negligence, outrage, false reporting, and lending criminal assistance against Paul Nicholi, an employee of the Department of Veterans Affairs. The Plaintiff alleges that Nicholi was assigned to assist him in seeking treatment at the VA hospital. Nicholi allegedly failed to assist Waggy in obtaining proper treatment, conspired with Child Protective Services to remove Waggy's daughters from his home, and "forced him into a psychiatric ward against his will." Compl. at 1.

The Plaintiff filed the present action in the Superior Court of Washington for Spokane County. The Defendant removed the action to this Court on June 4, 2007. On June 13, James A. McDevitt certified

1 that Nicholi was "acting within the scope of his employment as an  
2 employee of the United States at the time of the incident out of which  
3 this suit arose." Mem. In Supp. Of United States' Mot. For  
4 Substitution And Dismissal Att. A. The Defendant now moves to  
5 substitute the United States as a party.

#### 6 **DISCUSSION**

7 Under the Federal Employees Liability Reform and Tort  
8 Compensation Act ("the Westfall Act"), a party who has been injured by  
9 a federal employee acting within the scope of his or her office or  
10 employment has but one remedy: to bring suit against the United States  
11 under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 2679(b)(1).  
12 A suit under the FTCA remains the exclusive remedy even in cases where  
13 no relief is available under the FTCA. *United States v. Smith*, 499  
14 U.S. 160, 163, 111 S. Ct. 1180, 1183-84, 113 L. Ed. 2d 134, 142-143  
15 (1991).

16 When a federal employee has been sued, the Attorney General may  
17 certify that the employee was acting within the scope of his or her  
18 office. 28 U.S.C. § 2679(d)(1). Once the Attorney General has done  
19 so, the United States must be substituted as a party and the employee  
20 dismissed from the action. 28 U.S.C. § 2679(b)(1); 28 U.S.C. §  
21 2679(d)(1). The Attorney General has the right to decide the scope of  
22 employment issue in the first instance, and his or her certification  
23 is "conclusive unless challenged." *Green v. Hall*, 8 F.3d 695, 698  
24 (9th Cir. 1994)). The United States Attorney for the Department of  
25 Justice in the Eastern District of Washington has certified that the  
26 Defendant was acting within the scope of his employment as an employee

1 of the United States at the time of the incident out of which this  
2 suit arose. The Plaintiff has not challenged this certification.  
3 Accordingly,

4 **IT IS HEREBY ORDERED:**

5 1. The United States' Motion For Substitution and Dismissal, **Ct.**  
6 **Rec. 2**, is **GRANTED**.

7 2. The United States of America is hereby **SUBSTITUTED** as a  
8 defendant in place of Paul Nicholi.

9 3. Paul Nicholi is **DISMISSED** from this action.

10 4. Henceforth, the caption of this case shall be "Robert M. Waggy  
11 v. United States of America."

12 5. The parties and the District Court Executive shall conform the  
13 caption of all future filings in this case to that specified above.

14 **IT IS SO ORDERED.** The District Court Executive is hereby  
15 directed to enter this order and furnish copies to counsel.

16 **DATED** this 10th day of September, 2007.

17  
18 s/ Fred Van Sickle  
19 Fred Van Sickle  
20 United States District Judge  
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